ALL IN THE FAMILY: THE APOCALYPTIC LEGAL TRADITION AS CRIT-THEORY

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In 1986, a new genre of American legal education emerged upon the American legal conscience. Regent University (then CBN University) opened the first expressly evangelical law school -- early on in its genesis, Regent only accepted committed evangelical believers into its program. Since Regent's beginnings, at least three other law schools have opened with similarly expressed missions of recapturing the faith in the teaching of American law; the most recent is Jerry Falwell's Liberty University.[1]

This essay draws attention to Regent and Liberty as evangelical manifestations of American jurisprudential philosophy. Though formed out of a felt-need to inject conservative values (often times confused as moral values[2]) into the practice of law, Evangelical law schools embraced methodologies and disciplines that resemble non-conservative legal movements. This essay begins by describing the apocalyptic evangelical background from which Regent and

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[1] In 1998 Ave Maria Law School in Michigan opened proclaiming "[f]aith seeking understanding through reason is essential to discovering truth in its fullest sense. Both faith and reason have their origin in God and both are necessary in the pursuit of justice." *See* Ave Maria School of Law, Fides et Ratio, at http:// www.avemarialaw.edu/prospective/Philosophy/phil.cfm (last visited March 30, 2005). In 2001 St. Thomas University in Minneapolis, Minnesota opened with the mission of "integrating faith and reason in the pursuit of justice." *See* The University of St. Thomas School of Law *available at* http://www.stthomas.edu/law/about/ (last visited on March 31, 2005). In 2004 Liberty University School of Law opened its doors.

[2] The description of values as "moral" is a particularly loaded term; indeed, both liberal and conservative schools see their mission as moral. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM (1993).

Liberty evolved. Identifying their movement as the Apocalyptic Legal Tradition ("ALT"), the essay compares ALTs with the Critical Legal Studies tradition ("Crit"). Indeed, a comparison of ALT and Crit development recommends a close affinity between the two – even that Crit philosophy is the birthing ground for the ALTs. Indeed, this essay supports the broad scope of Crit philosophy to birth the ALT movement in the same way it gave birth to critical race theory (race-crits), feminist theory (fem-Crits), and other critical approaches to law. Specifically, the essay points to pedagogical and structural similarities between the ALTs and Crits that suggest a familial relationship between the two movements -- movements that at first blush appear irrevocably separated by their ideologies.

Part I - Contextual Development of the ALT and the Crit

1. The Apocalyptic Political Tradition of Regent and Liberty

In the last twenty years, Evangelical politics appeared in the legal academy. Birthed from this tradition, Regent and Liberty opened their doors with the explicit mission of renewing a legal philosophy in America that integrates faith and reason towards the shaping of a just society.[3] With promises to "infiltrate the culture with men and women of God who are skilled in the legal profession," and "to be as far to the right as Harvard is to the left,"[4] Liberty joined Regent's efforts towards writing a moral ethos of American law. Besides Falwell's personality, deliberate moves in the middle 1990's by Regent to realign itself closer to the American mainstream has left Liberty, if not alone, certainly distinct amongst legal institutions.[5] Yet still,

[3] Mission Statement, Liberty University School of Law, *available at* http://www.liberty.edu/Academics/ Law/index. cfm?PID=3813.
[4] Sean Carter, *Partisan Practice*, 35 ABA J. REP. 7 (2004).
[5] The story of Regent's becoming more mainstream appears to relate solely to accreditation issues with the American Bar Association ("ABA") and the American Association of Law Schools ("AALS"). *See infra* notes 65-69, and text accompanying. While Regent is closer to the American mainstream than Liberty, they remain close enough together to be considered in the same class.

Regent and Liberty comprise the main stalwarts of an evangelical attempt to reform the practice of law.

Liberty and Regent both evolve from an apocalyptic tradition of evangelical Christianity. This particular brand of evangelicalism believes that significant interaction between believers and government is necessary to fulfill its Biblically mandated calling of reforming social interaction.[6] Deriving from a dispensational theology,[7] ALTs hold that a pre-tribulation period will judge the sanctified prior to the final apocalyptic tribulation leading to the end of the world.[8] Accordingly, the role of the Apocalyptic Evangelical is to reshape American society before the tribulation begins. The law school initiatives by Regent and Liberty are just one manifestation of the reshaping; both Robertson and Falwell have employed over the years other political infrastructure that carries the mission of the Christian Right.[9]

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[6] *See* SUSAN FRIEND HARDING, THE BOOK OF FALWELL: FUNDAMENTALIST LANGUAGE AND POLITICS 233 (2000): "If you listen to their sermons and read their publications on unfulfilled biblical prophesies, you will hear them talk about current events. If you ask them about current events, you will hear them talk about those events in terms framed by biblical prophesy. Popular apocalypticism is not always political in the sense of advocating specific actions that count as political in American culture, but it is always political."

[7] Dispensational theology holds the view that there are certain periods of human history marked by a covenant by which men and women understand God. According to dispensation theology, the world is currently in the "Church Age" lasting from Christ's death to his return; the only means for knowing God is through Christ alone. *See* ALFRED THOMPSON EADE, THE NEW PANORAMA BIBLE STUDY COURSE (1975).

[8] Dispensational prophesy looks to the "rapture" wherein all unfulfilled biblical prophesy will be complete. Prior to the rapture, all Christians will be removed from the earth. They will return with Christ to reign on earth after the rapture. In the 1980's, dispensational preachers created a "new" time where, prior to the official rapture, Christians would be judged according to their merits. *See* HARDING *supra* note 2, at 241. Thus, this new time for judgment was presented as a time which God would weigh those to be removed prior to the Rapture. In the words of Harding, "with this little tribulation, Bible Prophesy teachers opened a small window of progressive history in the last days, a brief moment in time when Christians should , and must be agents of political and social change. *Id.*

[9] Besides both having law schools, both Robertson and Falwell support litigation and lobbying groups designed to represent the voice of the Christian Right. Falwell's litigation arm is Liberty Counsel while Robertson's is The American Center for Law and Justice.

One primary way of understanding ALT development is to understand their work as primarily political vehicles designed to support a conservative political agenda. Both Falwell and Robertson have been since the early 1980's active political figures. In 1979, Falwell established the Moral Majority largely in response to an ever-changing an normalized liberal culture.[10] The Moral Majority was just one example of the Christian Right's efforts to politicize morality issues in the early 1980's. The Moral Majority hit stride in the 1988 presidential election backing televangelist Pat Robertson for president. Despite the failure of the movement to elect Robertson, the majority's presence at the Republican National Convention was undeniable.[11] Though the movement would wane on the national stage because of televangelist scandals in the late 1980's, reduced financial resources, and a failed attempt to nominate a Presidential candidate, the Moral Majority found a niche in American politics -- providing a voice to evangelicals uncomfortable with liberal society. [12]

The Christian right vacillated between local and state government and having a national presence. Pat Robertson's Christian Coalition took up the political agenda of the right wing, and began actively lobbying for continued political reform at local levels primarily. But local politics was overshadowed by certain events that recast the Right in the national spotlight. For example, in 1995, right wing evangelicals like Robertson and Falwell found a new target in President Bill Clinton and his alleged immoral activities. Falwell drew both the praise and criticism of

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[10] *See* Matthew C. Moen, *The Transformation of the Christian Right* (1992) (describing the rise of the Religious Right as a response to Secularism and moral decline).

[11] The "Christian Right" garnered significant attention in the Republican party during the 1988 election year -- so much attention that Pat Robertson garnered significant attention for the Republican nomination and significant influence was had over policy and personnel decisions within the new administration. *See* Kevin Phillips, *The Rise of the Religious Right*, NEW YORK TIMES (03/1/1988) at A-23.

[12] Peter Steintels, *Moral Majority to Dissolve,* NEW YORK TIMES (7/12/1989) at A-14. One noted achievement Falwell claimed in closing the Moral Majority was the election of Ronald Reagan in 1980. *Id.*

evangelicals by promoting the Clinton Chronicles -- a video series accusing the President of various moral crimes, including murder and narcotics pedaling.[13] Though efforts such as the Clinton Chronicles were national moments, the main efforts of the Christian right, during the 1990s were mostly laid at the state and local level. Both Robertson and Falwell reemerged on the national scene in full force again in 2000 and 2004 in the wake of George W. Bush's bid for the presidency.[14]

Though larger than Falwell and Robertson, the Christian right generally has become identifiable by Robertson's and Falwell's activities, in particular, their issues.[15] The American mainstream identifies the Christian Right according to the issues at the fore of the Right's conscience -- abortion, prayer in schools, homosexuality, pornography, and illegal drugs, though there were other issues on the periphery that the Right sought to include. Succinctly, the Christian right sought to be identified as a wholly rounded political structure, capable of addressing public security issues as fluidly as they could morality issues, even conflating the two at times -- Robertson and Falwell found a way to merge national security and homosexuality

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[13] *See* Frank Rich, *Religious Right goes Hollywood*, NEW YORK TIMES (3/25/1998) at A23. Falwell even broadcasted the Chronicles on his television show the Old Time Gospel Hour. *See* Richard Berke, *Testing of a President: The Conservatives: Republicans See Jones Case as a Double Edged Sword*, NEW YORK TIMES (3/15/1998), at A1. Falwell sold more than three-hundred thousand copies after the Clinton Chronicles aired. Phillip Weiss, *The Clinton Haters: Clinton Crazy* (2/23/1997) at 6-35. Robertson also addressed the Clinton troubles by calling publicly for his resignation. B. Drummon Ayres, *Political Briefing: Citing Moral Crisis: a Call to Oust Clinton*, NEW YORK TIMES (10/23/1998) at A20. At the same time, evangelicals like Tony Campolo defended the president against the Religious Right's -- and particularly Jerry Falwell's -- advancement and "unbecoming tactics. See *An Interview with Tony Campolo*, CHRISTIAN CENTURY vol. 112 (2/22/1995) at 213. Nevertheless, in Clinton, the Christian Coalition and fundamentalist Christian Right found a target to reemerge into onto the national scene

[14] *See* Rob Boston, *Preachers, Politics, and Campaign*, 2000 CHURCH & STATE 8 (2000). Boston notes that both Falwell's and Robertson's activities ran afoul of current Internal Revenue Code provisions that restrict 501(c)(3) organizations from engaging in political activity.

[15] Other names that have prominently carried the Evangelical banner include Ralph Reed, James Kennedy, and Phillis Schlaflay.

following the September 11, 2001 terrorist attacks on the World Trade Center in New York, claiming homosexuals in America represented the moral decline that was the source of the 9-11 attacks.[16] The Right saw themselves as a total package, capable of addressing the moral issues of American society, while also providing insight into the traditional areas of political involvement.

The political manifestations of the Right serves to highlight the legal theory that ALTs contribute to American society. As a general proposition, ALTs are traditionalists – they prefer the sanctified past to the "imperfect present."[17] For example, ALTs, by and large, see the cause of the break down of the family as the high divorce rates and the move towards non-fault based divorce in the 1960's.[18] For ALT's the current family "crisis" is directly related to poor legal decisions in the 1960's that made no-fault divorce a mainstream choice. In short, ALTs define the corrupted present by the more perfect past. The Crits, on the other hand, see the present as the redemption of the imperfect past.

Moreover, the ALTS are by and large religious people. That is, legal issues relating to church and state are not simply matters of political difference -- they are matters that reflect a greater conflict of good and evil. Robert Berger notes that "attitudes towards religion and the place of religion in society are a key determinant of who stands where in the conflict. Opposing

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[16] *See* Frank Rich, *Gay Kiss: Business as Usual* NEW YORK TIMES (6/22/2003) at 2-21.

[17] Robert Bork described the culture war that pits "traditionalists" and "the liberal left": "Despite denials by some that any such conflict exists, the culture war is an obtrusive fact. It is a struggle between the culture or the liberal left and the great mass of citizens who, left to their own devices, tend to be traditionalists…" ROBERT BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 2 (2003). Indeed Bork assigns the rise of the "liberal left" to a number of factors including "unaccountable and powerful bureaucracies, the decline of belief in authoritative religions, the acceptance of an ethos of extreme individual autonomy, the influence of mass media, the explosive growth of the academic intellectual class," and his main concern, activist judges. *Id.* at 1-2.

[18] *See* Katherine Shaw Spaht, Marriage: Why a Second Tier Called Covenant Marriage?, 12 REG. U. L. REV. 1, 1 (1999) (assigning failures in the law's allowing no-fault divorce as a primary decline in the family).

norms span personal morality (sexual behavior and abortion) and the legitimacy of the state (religious symbols in public places, prayer in schools."[19] The legal questions are therefore recast in light of the moral and religious implications of those questions. Instead of seeking the plural interests of society, ALTs ultimate goal is the cleansing of society, regardless of whether the plural society is supportive or not. The Crits also see themselves as redeeming the values of culture, but observe that their values stem from a different source.

2. Critical Legal Studies of the 1970's and 1980's.

Nearly coinciding in time with the political activities of the Evangelical Right was the high point of Crit Legal studies. It should be no surprise that the liberal culture that effected a political response from the Christian Right also fueled the intellectual development of the left. Crit studies developed in the 1960's in response to the institutional nature of American law, namely a 1960's self-consciousness of power, institutions and the oppressed.[20] Neil Duxbury contextualizes the crit movement with the women's movement, civil rights movement, and the War in Vietnam.[21] Thus, the same culture that evangelicals responded to in the 1980's birthed the Crits in the 1970's.[22]

Crits grew from a hippie culture that rejected individualism and consensus orientation that so dominated the legal landscape. Law Schools in the 1960's, according to Crits, taught that

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[19] Peter L. Berger, *General Observations on Normative Conflicts and Mediation*, *in* THE LIMITS OF SOCIAL COHESION: CONFLICT AND MEDIATION IN PLURALIST SOCIETIES: A REPORT OF THE BERTELSMANN FOUNDATION TO THE CLUB OF ROME 355 (1998).

[20] A full exposition of the Crit movement would require exploration of its response to formalism, its roots in the law and society movement, and other contextual factors for which this essay is not designed. Fortunately, Neil Duxbury has considered such conditions. *See* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 421 *et seq.* (1995)

[21] *Id.*

[22] *See supra* note 9 and accompanying text & Duxbury, *supra* note 16, at 428 *et seq.* (describing the political backdrop of the Crit Movement).

American law derives from precedent continued by courts to maintain the empowered class.[23] Rejecting this consensus, the Crits argued that precedent should not be sacrosanct in American Courts, and deferred to reason, sympathy, and other non-empirical phenomena to arrive at a legal dogma.[24]

In some ways, the Crit rejection of consensus somewhat sealed its fate. Crits never adopted a clear unique position on which to focus its efforts. Mark Tushnet, a Crit theorist known for his Marxist understandings of government and control identified the unstructured nature of the Crit movement as its identifier: "Critical legal studies is a political location for a group of people on the left who share the project of supporting and extending the domain of the left in the legal academy. On this view, the project of critical legal studies does not have any essential intellectual component, which is why I cannot readily identify a great deal that is common in the intellectual production going under the heading of Critical legal studies."[25] One commentator has suggested this lack of direction caused some persons sympathetic to the Crit approach to focus their energies towards more concrete action rather than a "definably indeterminate indeterminism."[26] What is clear is that for a period, the Crit movement capitalized on a synergy of dissent that spurred new ideas to the fore.

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[23] Duncan Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71, 73 (1970). Notably, Duncan Kennedy was a student at Yale at the time he wrote and published this piece.

[24] *See* Duxbury *supra* note 19, at 422.

[25] Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L. J. 1515, 1516 (1991).

[26] E. Dana Neacsu, *CLS Stands for Critical Legal Studies; If anyone remembers*, 8 J. L. POLY 415, 419 (2000). Others criticized Crit theory as ultimately utopian: claiming the movement had "all bark and no bite" and that for all its critiques offered no viable alternatives to the legal structure. *See* Duxbury *supra* note 16, at 422 *citing* Phillip E. Johnson, *Do you Sincerely want to be Radical?,* 36 STAN. L. REV. 247 (1984) & Michael A. Foley, *Critical Legal Studies*: *New Wave Utopian Socialism*, 91 DICK. L. REV. 467 (1986).

The general mood of the movement even prompted a magazine published by students at Yale called the *Yale Review of Law and Social Action*. The Editorial Board of the Magazine said in the first issue:

> This first issue…begins our exploration of areas beyond the limits of traditional legal concerns. For too long, legal issues have been defined and discussed in terms of academic doctrine rather than strategies for social change. *Law and Social Action* is an attempt to go beyond the narrowness of such an approach, to present forms of legal scholarship and journalism which focus on pragmatic solutions to social problems.[27]

In the same forward the editors explained that the journal's articles would "span a wide range of interests and approaches," because of the experimental nature of the project. This experimental nature did not last long. By the third issue, the journal had assumed an unabashed defiant posture in legal scholarship. The editors explained to its readers in issue three of the first volume that:

> from the beginning of the magazine, we have been interested not only in a new type of legal journalism but also a new style of organization. We remain committed to avoiding the tyranny of unnecessary specialization and to testing whether an organization which shuns arbitrary authority and humiliation can produce a sound product.[28]

Thus, in a short span of twelve months, the journal had moved from an experimental stage in which specialization may have proven to be fatal, to an established defiant stage where specialization was completely rejected as tyranny. Indeterminable indeterminism was posh and preferred to the tyranny of organization, specialty, and hierarchy. In many ways Yale's Social Action Journal mirrors the imprecise nature of the Crit movement as defined by Tushnet; its not that they couldn't organize themselves enough to specialize in one issue or another, but that they rejected organization as a tyranny of oppressors and therefore embraced chaos theory over

[27] Editorial Board, *To our Readers*, 1 YALE REV. LAW & SOC. ACT. 1-4 (1970).
[28] Editorial Board, *To our Readers*, 1 YALE REV. LAW & SOC. ACT. 4-2 (1970).

specialty. The eventual ending of the journal seems to mirror the Crit experience as well. The journal only produced three volumes closing up shop after 1973, apparently from lack of student interest.[29]

As the 1980's came to a close, the lack of direction by the Crit movement caused those seeking more direct approaches to social issues to splinter off. Notably critical race theory (Race-Crit) and feminist theory (Fem-Crit) were two such movements. Like the ALTs, the Crits, Race-Crits, and Fem- Crits were movements seeking change to the legal order. Though they occupy different ends of the political spectrum, ALTs and Crits share common traits deriving from the Crit movement.

Part II -- Crit Characteristics

The Crit movement passed certain defining traits to its progeny. The ALT movement, as a branch of Crit theory, inherited the same Crit features as Race-Crits and Fem-Crits.

The first trait of the Crit movement was its incorporation of the historical narrative to explain not only the turmoil of society but the flaws of that history.[30] Crit theorists such as Morton Horwitz saw themselves participating in the historical narrative by not only defining

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[29] Michael Reisman, *The Vision and the Mission of the Yale Journal of International Law*, 25 YALE J. INT'L L. 263 n.2 (2000) (explaining the beginnings of the Yale Journal of International Law on the heals of the Review of Law and Social Action, says that the journal went out of business largely from disinterest by student organizers).

[30] Notably, Crit theory evolved from a consciousness that law develops not in linear patterns but more chaotically; the contribution of the Law and Society movement to Crit studies was the incorporation of empirical analysis to isolate the chaos and understand its impact on law. *See* Duxbury, *supra* note 16, at 445. *See also* David M. Trubek, *Where the action is: Critical Legal Studies and Empiricism in American Legal Studies*, 36 STAN. L. REV. 575 (1984). *But See* Mark Tushnet *Critical Legal Studies: An Introduction to its origins and Underpinnings,* 36 J. LEG. EDUC. 505, 512 (1986) (claiming that the critical legal studies movement is "relentlessly ahistorical). Note that L.H. LaRue took issue with Tushnet's conclusion in his article *Constitutional Law and Constitutional History* -- one of the finest pieces that the Crit movement produced. *See* L.H. LaRue, *Constitutional Law and Constitutional History*, 36 Buff. L. Rev. 373, 394 (1987).

what was wrong with American law, but what was wrong with the retelling of American law. Horwitz saw his work *The Transformation of American Law*[31] as a dissent from "consensus history" that he claimed prevailed since World War II. The problem that Horwitz saw as defining the historical narrative (and in turn the development of the Crit movement) was a failure to look to the questions under girding the telling of that narrative. For example, Horwitz tells us that "New Deal historians were much more concerned with finding evidence of governmental intervention than they were in asking in whose interest these regulations were forged."[32] His conclusion is that such writing not only ignored the effect of governmental regulation on the distribution of wealth and power in America, but that it served the interests of the empowered class to maintain its position in social and governmental interaction.[33] As demonstrated below, Race-Crit theory, Fem-Crit theory, and ALT theory all embrace the historical narrative as descriptions of dissent to explain not only why they exist as movements, but also why the telling of that historical narrative is imperfect.

This approach to the historical narrative informs the pedagogical method and defines the Crit existence as a dissenting sect from the mainstream. A primary premise the Crit movement understands is that power rests in the conveyance of law -- not in the law itself. Importantly, institutions that create, enforce, and instruct the law are more problematic than the law itself. Since Crits naturally stood on the outside of the creators (legislatures) and enforcers of law (courts), they would target the third institution (law schools) and seek social change from the ground up.

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[31] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977) & MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 (1992).
[32] Transformation 1780-1860 *supra* note 27 at xiv.
[33] *Id.*

A primary method for Crit theorists such as Duncan Kennedy was the restructuring of the American Law School away from the current state of law and towards a new dialogue that asked not only what the court did in a particular case, but why review this case at all, who is empowered by the reaffirmation of this case as precedent, and conversely who is left out of social power.[34] Underlying this critique was a critique of the entire law school structure from interactions between students and professors to the janitorial staff; the structure according to Kennedy taught students by experience that after their due suffering in the system, one day they too will be able to dominate someone else.[35]

One specific manifestation of this critique was towards the tradition model of the law professor. The tyrannical Professor Kingsfield, of the movie *the Paper Chase*, was the

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[34] *See* Robert W. Gordon, *Brendon Brown Lecture: Critical Legal Studies as a Teaching Method,* 35 LOY. L REV.383, 384 (1989).

[35] *See* DUNCAN KENNEDY, LEGAL EDUCATION & THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM 53 (1983). Kennedy's suggestion that Deans and Professors swap places with the janitorial staff was met with distemper by legal academics. *See e.g.,* Louis B. Schwartz, *With a Gun and Camera Through Darkest CLS Land,* 36 STAN. L. REV. 413, 413(1984): "I was delighted by his Chutzpah and remained convinced that he was kidding until I read his dissent from the Report of the Committee on Educational Planning and Development of the Harvard Law School. He meant it! *Id.* Schwartz later chastises such claims by Kennedy as evidence of the Crits proceeding "without pragmatic basis or sensitivity to institutional issues. *Id.* at 414.

It is also apparent, however, that the janitors at Harvard were not too keen on Kennedy's suggestion either. *See* Brian Timmons, *That's No Okie, That's my Torts Professor,* WALL STREET J. (4/3/1990), at A-20. Timmons quotes on janitor at length:

> I might be a janitor, but does this guy really think we are stupid enough to believe him? It's all showbiz blabbermouth crap! If he were really concerned about the work we do, he'd offer to some help us once in awhile, rather than just talking it up to the world. I haven't seen any law professor busting his butt to come buff the floors with me. Most probably don't know how! We can't even get them to empty their own trash! I'd settle for that rather than some highfalutin job swapping idea that this guy knows would never happen in a million years. Maybe he can sell that line to a bunch of fruitcake students, but he sure can't fool us janitors.

stereotypical image associated with the teaching of American law.[36] Kingsfield taught contracts using the Socratic method of question, answer, and then more questions. What is more astonishing for the Crit is what he did not teach: policy behind contracting; the notions of moral exchange or any other modern thought that weighed upon contracting in practice. But more importantly, Kingsfield represented for law students the barrier that existed between the hierarchy of faculty and students. He was distant, cold, and intimidating. From the Crit perspective, Kingsfield was everything that was wrong with the American legal culture. Describing real faculty in his commentary on the failures of the American legal system, Duncan Kennedy writes:

> one of the most lasting impressions that many students have of the law school is that the teachers are either astoundingly intellectually self-confident or just plain smug… 'Smugness' is a minor vice. There is another quality which is very generally perceived in the faculty which is much more important: hostility…What I am asserting… is that if you ask the more sensitive students what they feel is the dominant tone of the classroom of this or that professor, and then probe the answer even a little bit, you will discover the perception of hostility.[37]

In addition to hostility and distance, there was also the dismissal by professors of other disciplines of study besides the science of law.[38] Thus it was the professorial model of Kingsfield -- distant, oppressive, and uncreative -- that represented the institutional problems of law.

Somewhat expectedly, the mainstream responded to Crits like Kennedy by isolating them as a fringe movement, which resulted in a structural development of the Crits. Notably, Crit theorists found themselves on the outside of the law school mainstream through the 1970's and

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[36] The Paper Chase debuted in 1973 and followed the experiences of first-year law students at Harvard.
[37] Kennedy, *supra* note 19, at 72.
[38] *Id.*

1980's.[39] Viewed as radical dissidents, Crit theorists were denied tenure in some schools, and overall isolated from the mainstream as "that group" who lobbied for radical reorganization of the American legal culture.[40] The Crit response was to seek refuge, not within the law school structures that they sought to alter, but within a convention of fellow thinkers.[41] What began in the Crit movement as a discreet theory critical of the legal approach, had by the early 1980's evolved into a movement with an annual convention, symposia, and publications servings as the safe haven for Crits to commiserate over the state of American law.

The Crit movement, as noted above, suffered according to its own lack of direction. By the mid-1990's the Crits were more of an after-thought than any describable movement -- according to one commentator "falling on its own sword" of inconsistency and lack of direction.[42] Out of the critical legal studies movement, though other critical theories of jurisprudence have developed -- most notably Race-Crits and Fem-Crits, but also critical literary theory, post-cultural theory, and according to some, legal pragmatism. Though the linear development of these movements suggests a Crit lineage, Race-Crits and Fem-Crits reject the lack of personal perspective in the general Crit movement. According to one Fem-Crit, the feminist critique starts from an experiential perspective of the oppressed, dominated and devalued, while regular Crit theory "begins -- and, some would argue, remains -- in a male-constructed privileged place in which domination and oppression can be described and imagined

[39] *See* Duxbury, *supra* note 16, at 437.
[40] *See* e.g., Duncan Kennedy, *Are Lawyers Really Necessary?,* 14 BARRISTER 11, 12 (1987) (linking tenure dispute at Harvard to Crit Professors); *see also* Jennifer A. Kingson, *Harvard Tenure Battle puts Critical Legal Studies on Trial,* N.Y. TIMES (8/30/1997) at 4-45.
[41] *See* Duxbury, *supra* note 16, at 447.
[42] *Id.* at 469

but not fully experienced."[43] As such, they have no problems, while honoring the subtle similarities of the Crit movement to their own, rejecting Crit theory as simply incomplete. The rest of this essay attempts to show how the traits discussed above reoccur in the ALT, Fem-Crit, and Race-Crit traditions.

1. The historical narrative as a defining experience.

ALTs, like their Crit paternity, find merit from the historical narrative that is told within the movement. Similar to the Crit story, the ALT story is one of disenfranchisement and marginality within the current American legal drama. Also like the Crits, ALT history informs their pedagogical method, which impacts structure. The pedagogical method used by Crits and ALTs relate directly to the historical telling of law in both the Crit and ALT tradition. In the example cited above, Morton Horwitz defines the pedagogical problem in teaching law with the historical development of law. Succinctly, because those empowered also convey, the message being conveyed is naturally towards maintaining the empowered. Thus from Horwitz's perspective, the transformation of American law begins by retelling the story.

The ALT historical narrative suggests that at one time American law was pure.[44] Founded by our forefathers as a Christian nation, Biblical morals influenced the young country which promoted not only a Christian Government, but the expression of laws that supported that Christian government. ALTs place a high premium on the founding of this country as the

[43] Carie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education: or "The Fem-Crits go to Law School*, 38 J. LEGAL ED. 61, 61 (1988). Critical race theory evolves the same way, rather criticizes the white gentry rather than the male. *See* T. Alexander Aleinkoff , *A Case for Race-Consciousness,* 91 COLUM. L. REV. 1060, 1069 (1991).
[44] *See* John Eidsmode, Christianity and the Constitution 382 (1987) (attempting to argue that the founding fathers were influenced by and promoted Biblical values in their understanding of the law).

beginnings of their legal heritage. Thus, it is critical for ALT theorists to disavow traditional historical work that tends to suggest a less-pious beginning to the American Republic.[45]

Likewise, the Race-crits and Fem-Crits find equal validation from history; yet their shared experience is not one of disenfranchisement but of never belonging. Richard Delgado and Jean Stefancic, in their annotated bibliography of Critical Race theory note that one common element is the emphasis on storytelling / counter story telling:

> Many critical race theorists consider that a principle obstacle to racial reform is majoritarian mindset -- the bundle of presuppositions, received wisdoms, and shared cultural understandings persons in the dominant group bring to discussions of race. To analyze and challenge these power-laden beliefs, some writers employ counter stories, parables, chronicles, and anecdotes aimed at revealing their contingency, cruelty, and self-serving nature.[46]

Thus, for critical race theorists like Alexander Aleinikoff, the history of racial discrimination in the housing market, college admissions programs, and the work place should inform Supreme Court decisions and guide their application of constitutional principle.[47]

Fem-Crits hold a similar perspective on history. In explaining the ambivalence apparent to women's issues in American law, one commentator blames the historical legacy of American law: "For most of American history, emphasis on women's distinctive perspective has worked against women's distinctive interests."[48] She goes on to explain that the historical experience of women has shaped and contoured the modern woman's experience in the law; and though improvements have been made, "the rhetoric of gender equality does not yet match the reality of

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[45] *Id.* at 390 ("Harvard Law Professors don't address themselves to the common sense of the people today.").
[46] Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Biography*, 79 VA. L. REV. 461, 462 (1993).
[47] *See* Alexander T. Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325 (1992).
[48] Deborah L. Rhode, *The "Woman's Point of View*," 38 J.LEGALED.39 (1988).

women's experience." [49] The common denominator in the historical experience of Race-Crits, Fem-Crits, and ALTs is the shaping of historical narratives to answer the current problems in American law.

Moreover, in all three traditions, the historical narrative shapes the concrete and institutional responses. Thus, the CLS legacy to the Fem-Crits and the Race-Crits was a strong critique of the American law school. For both the Fem-Crits and the Race-Crits, the way the question is initially asked in the academy, equates to how it is practiced in society. Thus the image of the traditional law professor (who is a white male) is from the feminist (and I dare say the Race-Crit perspective) "boorish and pompous. [Kingsfield] affirms the values of the highest intellectual excellence, yet he accepts from his students as correct the most question-begging doctrinal responses."[50] The conclusion is that legal education has certainly more to offer than a Kingsfield - namely policy, encouragement, and unbiased instruction.

Like the Race-Crits and the Fem-Crits, the ALTs have identified themselves with a problem in American legal education. Quoting Liberty's welcoming brochure, the dean of the law school says:

> Professional literature paints a distressing picture of the state of legal education, its impact on law students, the legal profession and the law. It is a picture of the separation of faith and morals from law, the demise of the rule of law, the degeneration of the pursuit of justice into a calculating gamesmanship, and the loss of the legal profession's soul. [51]

Both Liberty and Regent claim that their mission relates to the reshaping of the American Legal tradition. With nostalgic phrases triumphing "such a legal philosophy [that] was once the

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[49] *Id.* at 40

[50] Catharine W. Hantzis, *Kingsfield and Kennedy: Reappraising the Male models of Law School Teaching*, 38 J. LEGAL ED. 155, 156 (1988).

[51] Liberty University Viewbook, p. 5, *available at* https://www.liberty.edu/media/1190/School%20of%20 Law%20Viewbook.swf.

dominant one in America," and proclaiming that Liberty is a place where there is a "rebirth of old ideas and ideals," Liberty identifies a lost history that needs to be reclaimed. Similarly Regent claims: "We are not just creating more lawyers; we are creating a different kind of lawyer."[52] Indeed, Liberty and Regent see their primary means of offering constructive social change is to alter the law school tradition. The means, according to Liberty's materials, is a unique approach to the teaching of American law: instead of competition - there will be collaboration; instead of ridicule - there will be compassion; instead of distance - there will be instruction; succinctly, the message is instead of Kingsfield, there will be Falwell. Like the Crits (Fem-crits and Race-crits included) Liberty and Regent's recasting of American law begins with the American law school.

ALT and Crit theory agree that one way the law school fails American law is its failure to teach true justice. Roger Bern, an ALT theorist cites Crit Roberto Unger in Bern's call for Biblical Principles to be applied to the practice of law: " Roberto Unger identifies a common and perplexing experience in Modern Society: the sense of being surrounded by injustice without knowing where justice lies."[53] Both Unger and Bern proposed that defining ethics, justice and politics lies within the community: "Community begins with sympathy. Sympathy means that people encounter each other in such a way that their sense of separateness from one another varies in direct rather than inverse proportion to their sense of social union."[54] Where Bern and Unger separate is Bern's insistence on the Biblical ordination of the community that defines the

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[52] *See* Regent Welcoming Statement, *available at* http://law.regent.edu/welcome/home.cfm (last visited on March 30, 2005).

[53] Roger Bern, *A Biblical Model for Analysis of Issues of Law and Public Policy: With Illustrative Applications to Contracts, Antitrust, Remedies, and Public Policy*, 6 REG. L. REV. 103, 103 (1995). It should be noted that Bern himself recognizes the distinctly Crit leanings of his own philosophy. *Id.* n. 4, at 103.

[54] ROBERTO UNGER, KNOWLEDGE AND POLITICS 262 (1975).

ethical struggle. Indeed, Unger is content to allow social interaction dwindle to a sort of tribal communalism,[55] while Bern would rather see that community built around Biblical mandate: "an unapologetic return to the transcendent religiosity giving foundation to the ideals of autonomy and generality in law, and in particular to the law of nature and divine revelation found in the Holy Scriptures."[56] For Bern, the failure to recognize a Biblical mandate of law has created a cynicism amongst law students that there is no justice available in the law.[57] Thus, the institution's failure to honor the historical past for Bern causes a degenerative effect in social justice. In this way., the Crit and the ALT are almost indistinguishable – both point to institutional failures with one citing a failure to understand community sympathies (Unger) and the other citing the lack of a community standard (Bern).

One other concrete way that the ALTs attack legal institutions is towards activist judges. One ALT theorist explains the special interest Evangelical Christians have in impeaching activist judges based on a special understanding of Biblical Covenants.[58] He illuminates his reasoning, quoting first the Supreme Court's opinion in *Planned Parenthood v. Casey*: "The Constitution is a Covenant running from the first generation of Americans to us and then to future generations."[59] Then the historical narrative frames the ALT reasoning. "Unfortunately, the Justices who wrote the joint opinion [in *Planned Parenthood v.* Casey] did not understand covenant principles very well. Covenant is a religious concept, originating in the ancient Near Eastern religions. Covenant is also a critical component of Christianity. From Christianity, the idea of covenant was adopted by the American Founding Fathers…" This ALT theorist moves

[55] *See* Duxbury, *supra* note 19.
[56] *See* Bern, *supra* note 17, at 107.
[57] *Id.* at 106.
[58] Stephen W. Fitschen, *Impeaching Federal Judges: A Covenantal and Constitutional Response to Judicial Tyranny*, 10 REGENT L. REV. 111, 118 (1998).
[59] *Id.* citing *Planned Parenthood v. Casey*, 505 U.S. 833, 901 (1992).

seamlessly between covenant response, the evangelical influences on the founding fathers and judicial activism. Importantly, this move is dependant on a historical narrative that embraces the ALT perspective of Constitutional influence.

Again, this focus towards activist judges is not unique amongst ALT critics. For example, Race-Crits would argue that the Dred Scott case in 1859 represented the worst kind of judicial formalism in American law.[60] That formalism froze legal doctrine at a point most favorable to the controlling class -- the white planter class of the South.[61] The distinction between ALT and Race-Crit critiques of judicial power is the transition in the last thirty years towards a judiciary more inclined to accept liberalistic ideas favorable to the Race-Crits -- though I am certain Race-crits would likely challenge this statement. Thus, Race-Crits do not see judges as "activist" anymore unless they rule in a way that offends Race-Crit theory. This is not to say that Race-Crits and ALTs are always diametrically opposed. What this is suggesting is that Race-Crits look to Dred Scott as the same type of judicial activism that ALTs critique right to life cases today. Likewise, ALTs perceive the historical judiciary as upholding common values as opposed to the modern judiciary which has destroyed the moral ethos of modern law. In a sense, ALTs vie for a type of judicial activism -- just their type.[62]

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[60] Barry Friedman, *The History of the Counter-Majoritarian Difficulty: Part I: The Road to Judicial Supremacy,* 73 NYU L. REV. 333, 421 (1998).

[61] Horowitz, *supra* note 28.

[62] A good example is the recent stand-off between Former Alabama Supreme Court Justice Roy Moore the and Federal Courts. When given an order to remove the stone monument to the Ten Commandments, former Judge Moore refused, claiming that to do so he would violate the Alabama Constitution which recognizes the Ten Commandments as a source of law. *See Judicial Courage in Alabama*, NY.TIMES (11/14/03), at A-28. Importantly, the ALT's view the judges that removed Moore from the bench as activists, whereas, Moore is seen as a victim. Activism is simply a word that is ballyhooed around, and has come to mean whatever the minority out of power would like it to mean. *See e.g., Ex Parte Anonymous,* 2001 Ala. LEXIS, 202 (wherein the dissent accuses the majority of Judicial Activism, only for the concurrence to suggest activism is really the position held by the dissent).

The ALT concern with activist judges is a discreet recognition that like the Fem-Crits and Race-Crits, they view law as political. The manifestation of history in the ALT tradition, like the feminist and Critical race traditions, reveals criticism aimed towards institutions that continue to promote incorrect ideologies. The institutional manifestations of History also helped define the structural integrity of the ALT, and Crit movements.

2. Structural similarities between the ALT and Fem/Race Crit Movements.

The similarities between ALT theory and Crit theories move beyond methodology. Rather there are strong similarities in the structural evolution of these particular movements from a lose confederation of dissident theorists to a polity with organization and structure. Both the ALTs and the Crits sought refuge in private communities and both suffered from being marginalized by the mainstream. Further, the culmination of organization in ALT, Fem, and Race-Crit theories are homogenous movements that have banded together in separate units to insulate themselves from the mainstream.

From the same mood in the 1950's and 1960's that urged Evangelical political action, a convention of lawyers dedicated to the Christian practice of law arose. Formed in the 1960's, the Christian Legal Society was created for the sharing of mutual ideas and "fellowship" amongst Christian attorneys.[63] As the story is told by the Christian Legal Society, the group began as two lawyers commiserated over the lack of a network for "sharing their problems and finding fellowship."[64] CLS's main purpose was not to change law; rather it was formed to support

[63] Samuel B. Casey, *Great in His Faithfulness: 43 Years of His Story at CLS* available at http://www.clsnet.org/clsPages/history.php.

[64] *Id.* The five original purposes of the organization were: (1) To provide a means of society amongst Christian Lawyers; (2) To Clarify and promote the concept of the Christian Lawyer; (3) To encourage and aid deserving young students in preparing for the legal profession; (4) to provide a forum for the discussion of problems relating to Christian and the law; (5) to cooperate

Christians involved in law, though there was a spirit of dissent from American legal culture inherent in the organization.[65]

Indeed, the lawyers beginning the CLS did not realize the following their movement would engender. In many ways the movement owes much of its success in the early 1960's and 1970's to the same factors that led to the Crit success during the same time period: a material consciousness of justice in American law, and the normalizing of a leftist culture. Indeed, the very forces that would prompt people like Duncan Kennedy and Mark Tushnet to conclude that American law had to embrace a more leftist posture would prompt 2000 attorneys to join the CLS in the 1970's to counter such movements. Out of that mandate grew the CLS's Center for Law and Religious Freedom, an advocacy organization focusing on the intersection of religious and public life in America.[66] As the CLS movement grew in numbers, it also found a marketing sector that fueled the development of Regent and Liberty in 1986 and 2004. That is, the CLS movement discovered that there was a niche for the evangelical practice of law -- a niche that attended conferences, purchased books, and paid membership dues.[67] Picking up on this spirit that there was a market for the evangelical practice of law, Pat Robertson opened Regent to capitalize on the market. The lesson learned by the Regent and Liberty was all too obvious: that Jesus sells to lawyers too.[68]

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with bar associations and other organizations in asserting and maintaining high standards of legal ethics.

[65] *Id.*

[66] *Id*

[67] Since its inception, the CLS has held an annual conference, sponsored publications, and collected membership dues. Indeed, the trait that bound the CLS to modern evangelical culture was its recognition of an audience for its product.

[68] *See* STEPHEN PROTHERO, AMERICAN JESUS: HOW THE SON OF GOD BECAME A NATIONAL ICON 124 et seq. (2003) (describing the trend amongst evangelicals (and the effectiveness) of marketing Jesus).

Perhaps the history merely suggests that the evangelicals were better marketers and organizers than the Crits (including Race or Fem Crits); as to date no expressly feminist law school has opened. Yet the Fem-crit and Race-crit evolution can't be evaluated apart from a Crit movement that rejected specialization. Thus Fem-crits and Race-crits being relatively young movements, may not have the structural capacity to open their own law schools.[69] But, they may not want to. These groups have been able to do something that ALTs have not – effectively organize themselves through conferences and publications from within the mainstream academy. Thus, though Fem-crits and Race-crits do not have an institution to seek refuge in, they do have the theoretical institution that crosses the lines of institutions in which they seek consolidation. In some ways, the fact that Fem-Crits and Race Crits are able to organize without overtaking institutions validates their approach within the greater academic community. While there are ALTs that exist outside of the two stalwart institutions dedicated to its furtherance, the ALT theory, to my knowledge, has not been identified and these professors tend to relate based on an affinity of certain ideas, not according to ideology of the law.[70]

What the conferences of ALT, Fem and Race-Crits maintain in common is the providence of homogeneity in their approach. By definition their groups are closed off from those outside their boundaries, though each expect to teach those they exclude from the inner circle of knowledge. Fem-Crits must be female because only females understand the oppression experience common to all non-males. Race-Crits must be non-white for the same reasons that

[69] There do exist historically black universities that have law schools, but these schools were in practice long before race critical theory entered the American conscience, thus their association with Race-Theory is more accidental than any type of purposeful approach.

[70] Kathryn Sphaht at Louisiana State University Law Center comes to mind. Sphaht is highly sympathetic to the causes of the ALTs, though probably would not be defined as an ALT herself. She has produced articles supporting causes that the ALTs embrace, most notably the covenant marriage movement.

Caucasians cannot comprehend racial disenfranchisement in America. And ALTs must be Moralists that can truly comprehend the importance of reclaiming America's moral history.

This structural rigidity has led to a wider gulf between the progeny of the Crit movement and the mainstream. Consider Regent's move towards and then away from the mainstream. In 1986, Regent took over the law school that was once known as Oral Roberts University. Oral Roberts University was fully accredited and, though the leanings of its name sake were clearly apocalyptic, the law program itself was mostly mainstream. Upon Regent assuming control, the school expressly undertook an evangelical character.

Both the American Bar Association (ABA) and the Association of American Law Schools (AALS) refused to transfer the accreditation of ORU's law school according to its rules and procedures.[71] Regent attempted accreditation in 1987 and again in 1989. In the aftermath of the 1989 attempt, it became clear that there was genuine concern by the ABA regarding whether a law school controlled by an outspoken evangelical organization could comply with ABA teaching requirements, in particular requirements to teach law that evangelicals may find morally offensive.[72] The ABA also expressed further concerns regarding CBN's (now Regent's) lack of student and faculty diversity.

These matters came to a head prior to Regent's eventual accreditation. In 1993, the then controversial and extremely conservative Dean Herbert W. Titus, was fired from Regent in an effort to centralize the school away from evangelical orientation.[73] The move to fire Dean Titus was a last-resort move by the University to minimize his influence over the accreditation

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[71] *See* Robert A. Destro, *ABA and AALS Accreditation: What's Religious Diversity Got to Do with it,* 78 MARQ. L. REV. 427, 451 (1995).
[72] *Id.*(e.g., abortion and Roe v. Wade).
[73] *See* Jennifer Ferranti, *Regent University Wins Tenure Lawsuit*, CHRISTIANITY TODAY (10/2/1995) at 104.

process. Sensing the process was in jeopardy for the third time, the University offered Titus a "golden parachute" -- a year sabbatical and a honored chair in Constitutional law, worth more salary and larger stipends. [74] Titus refused, was fired, and in his wake, at least four other professors were also dismissed for insubordination in their support of Titus.[75] An official complaint was filed with the American Bar Association Accreditation Committee alleging lack of academic freedom. Additionally, at least two law suits originated from the process. Regent was finally granted accreditation in 1995. Since gaining accreditation, Regent has moved back away from the mainstream, attempting to recapture an image of evangelical reform.

The Fem-Crits experienced a similar marginalization at Harvard, being left out of tenure positions, and forced to seek job security elsewhere.[76] Interestingly, as both sets of radicals were ousted from their respective universities, they did so trumpeting notions of academic freedom and despotic rule within the law school community. The shared experience of marginalization is more than a coincidence of radical groups; it arose because both the ALTs and the Crits chose to stand-off against the mainstream, instead of working for subtle changes within.

Conclusion

The legacy left by the Crit movement reveals a shared experience by its progeny. As fringe elements on the American legal spectrum, they find commonality in their targets and their structure, though there are differences in their ideology. The major difference currently is that Fem-Crits and Race-crits have found a resting place within the American Legal Academy, where ALTs have been forced to created their own. Whether the emergence of the ALT academy is a conscience result of the American Academy rejecting ALT theory, or a conscience self-removal

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[74] Mark O'Keefe, *Faculty Complaint Clouds Regent Law Accreditation*, CHRISTIANITY TODAY (11/2/1995) at 40.
[75] *See id.*
[76] *See supra* note 19 and text accompanying.

by ALTs from the American Academy, the paradox is the commonality shared by ALTs and the other fringe elements of American law. And whether these features are incidental to radical fringe movements or just derive from one type of radicalism, the affinity of relationship is meaningful. It is noteworthy that when ALTs seek to support their ideas, they turn to Crits for power. Though probably to be refuted by ALTs,[77] the similarities suggest a proximity to leftist origins that neither ALTS or Crits are necessarily comfortable to acknowledge.

[77] Jerry Falwell's statement that Liberty would be as "far to the right as Harvard is to the left comes immediately to mind. *See supra* note 3. *See also* John Eidsmode*, Christianity and the Constitution* 285 (1987) (criticizing Crit theorist Roberto Unger for his theory, yet utilizing the same methodology as Unger in his approach).